



REPUBLIC OF KENYA

High Court at Eldoret

Civil Appeal 34 of 2010

DAVID K.

TALLAM:.....APPELLANT

VERSUS

MOSES OMOIT DOKORIA

CHRIS HARRY EGOLET

T/A ROCK PETROLEUM DISTRIBUTORS:.....RESPONDENTS

RULING

The application before me is dated 6th February, 2013. It seeks two (2) substantive reliefs, namely;

(a) A declaration that the sale of a motor vehicle, Registration Number KYE 210, on 4th February, 2013 is nulled.

(b) A declaration that the advertisement for the sale of the said motor vehicle, which appeared in the “Star” newspaper on 24th January, 2013, was invalid.

The applicant contends that the sale was fraudulent and illegal.

He explains that there was no order of the court, directing that there be an advertisement on 24th January, 2013.

In any event, the auctioneer is accused of advertising the sale for a period that was less than the required 15 days. In effect, the applicant believes that the auctioneer colluded with some members of staff at the Court Registry, to defeat the course of justice by ignoring the orders which the court had granted, staying execution.

In support of the application, the applicant's advocate, **CHARLES DUKE NYAMWEYA**, swore an affidavit. By the said affidavit, he explained that on 31st January, 2013, this court issued an order for stay of execution. However, notwithstanding his best efforts, he failed to extract the formal order until 5th February, 2013.

On that same date (5th February, 2013) the learned advocate served the order upon **Messrs KARIRA & COMPANY ADVOCATES**, who are the lawyers for the Respondent.

Upon receipt of the formal order, the advocate for the respondent notified the advocate for the applicant that the motor vehicle in issue had already been sold.

The applicant also served the order on **Messrs IGARE AUCTIONEERS**, on 5th February, 2013. The said auctioneers also told the applicant that the vehicle had already been sold.

At that point, the applicant asked for, and was shown an advertisement in "**The Star**" newspaper dated 24th February 2013.

As far as the applicant was concerned, the auctioneers had no legal authority to advertise the sale of the motor vehicle, because the court had not issued any warrant for sale.

The advocates for the respondent are said to have written to the court on 29th January, 2013, seeking the re-issue of warrants for sale. Even though the warrants were issued on the same date, the applicant emphasizes that the advertisement and sale of the vehicle was unlawful, as the same were not authorized by the court.

Furthermore, the sale was deemed irregular because the same was not advertised for at least 15 days, as prescribed by Order 22 Rule 58 of the Civil Procedure Rules.

The applicant submitted that the sale was a nullity because it was advertised in a manner that was not sanctioned by the court, as envisaged by Order 57 rule 1.

In answer to the application the respondents submitted that this court lacks jurisdiction to hear and determine it.

I was told that this court had already dismissed the appeal that was lodged before it. Therefore, if the applicant was still dissatisfied, he was told, (by the respondents) that he could only appeal to the Court of Appeal.

In any event, as the orders sought were for a declaration that the sale that was being challenged was a nullity, the respondents argument was that this court cannot be called upon to determine an issue which was not before it.

When making his submissions, **Mr. Karira** advocate, pointed out that the sale which the applicant was seeking to nullify was not the subject of the appeal which the applicant had lodged before this court.

In any event, argued the respondents, if an application for stay of execution were to be advanced, the same should have been made before the Chief Magistrate's Court, which had passed the Decree in question.

The High Court was said to have only been concerned with the appeal arising from the objection process.

The respondents submitted that the applicant had invoked the wrong provisions of the law. Their view as the applicants ought to be reminded that there was need to comply with legal requirements. If applicants failed to comply with the requirements of the law, the respondents believe that procedure would simply be thrown out of the window.

To that end, I was told that Order 22 rules 22(1) and (2) of the Civil Procedure Rules were the correct ones, if the applicant sought stay of execution and the restitution of attached property.

And even then, such an application could, in the considered opinion of the respondent, only be made before the court that issued the Decree in issue.

On the other hand, if an auction was irregular in the process of sale, the respondents submit that such an irregularity could not nullify the sale. In their view, Order 22 Rule 65 makes it clear the person aggrieved with an irregular sale was only entitled to institute an action for compensation.

As any action for compensation could only be instituted against the auctioneer, the respondents submitted that the rules of natural justice demand that the auctioneer be made a party to the action.

The respondent pointed out that they had no capacity to answer the questions of fact, which were handled by the auctioneer, who had not been served with the application in contention.

As there was no pending appeal, this court was told by the respondents, that an order for stay of execution would be irregular.

I was also invited to find that the applicant was a frivolous litigant, who had filed many applications without following due process. In particular, the applicant was faulted for seeking an order for the stay of execution pending an appeal, whereas he had not taken any steps to comply with the rules of filing an appeal.

In determining the issues before me, I will commence with the respondents' invitation, that this court should find the applicant to be a frivolous litigant.

The “**Longman Dictionary of Contemporary English**” defines the word “**Frivolous**” as follows:

“1. *Not serious or sensible, especially in a way that is not suitable for a particular occasion.*”

2. *A frivolous person likes having fun rather than doing serious or sensible things.”*

That would imply that a frivolous litigant was a litigant who was having fun, rather than one who was doing serious or sensible things.

If the applicant honestly believes that the vehicle in issue was his, and that the respondents were trying to deny him that which is rightfully his, then the applicant cannot be said to be doing something that was not serious or sensible.

I find no reason in law or in fact for declaring the applicant to be a frivolous litigant.

The second matter that I wish to delve into is as appertains to the respondents' Preliminary Objection, which was lodged in court on 13th February, 2013.

Although the said Preliminary Objection was filed, it was not prosecuted as such. Instead, the respondents filed their submissions, in which they made it clear that the said submissions were on the application.

If a party intended to raise a preliminary objection, then he ought to canvass the said objection before the application is argued. If the court were to uphold a preliminary objection, the applicant would be shut out from arguing his application, as the objection would have disposed of the application.

Sir Charles Newbold P. expressed himself as follows, in the famous case of **MUKISA BISCUIT MANUFACTURING COMPANY LIMITED -VS- WEST END DISTRIBUTORS LIMITED (1969) E.A. 696 at page 701:**

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

In this case, the applicant has asserted that the vehicle in issue was sold fraudulently and illegally. He has also asserted that the auctioneers who sold the vehicle, had colluded with registry staff, to defeat the course of justice, by ignoring the orders for stay of execution.

If those assertions were assumed to be factually correct, it would be wrong to shut out the application, summarily.

I therefore find, that even if the Preliminary Objection had been canvassed as such, (which it was not), the same had no merits. It is therefore overruled.

The next phase of this ruling is in relation to the substance of the application. And, in order to place the same within context, there is need to restate the history of the case.

The applicant, **DAVID K. TALAM**, was **NOT** a party to the original case, which is **MOSES OMOIT DOKORIA & CHRIS HARRY ENG'OLET T/A ROCK PETROLIUM DISTRIBUTORS - VS- TARITA DEVELOPMENT LIMITED, ELDORET CHIEF MAGISTRATE'S CIVIL SUIT NO 421 OF 2008.**

The claim in that suit was for the payment for petroleum products which the plaintiff had sold and delivered to the defendant. The sum in issue was Kshs. 670,500/- in respect to which the defendant had allegedly, issued a cheque. The cheque was dishonoured when it was presented for payment.

In its defence, the defendant asserted that the plaintiff did not supply it with the petroleum products. And although the defendant issued a cheque, the same was stopped because the petroleum products were never received by the defendant.

The plaintiff's application for summary judgment was rejected. Thereafter, the suit went to a full trial, and the court granted judgment in favour of the plaintiff.

When executing the Decree, the plaintiff attached a motor vehicle registration number KYE 210.

Following the attachment of that vehicle, the applicant moved to court, laying claim to the ownership of the said vehicle.

The applicant's applications were struck out because of non-compliance with legal requirements. In her ruling, the learned Senior Resident Magistrate, **Ms. G.A. Mmasi**, stated, inter alia;

“The objector is ordered to follow the procedures precedent before filing any application in court as matters stand. He has come to court prematurely.”

Thereafter, the applicant moved the court again. But the court held that the applicant had failed to prove ownership of the lorry.

Being dissatisfied with the decision of the learned magistrate, the applicant filed an appeal to the High Court.

On 3rd August, 2012, the High Court, (**Mshila J.**) dismissed the appeal. When doing so, the court observed that the learned magistrate was correct to have held that the applicant had failed to follow the correct procedures when commencing objection proceedings.

Notwithstanding the said dismissal of the appeal, the learned Judge reminded the applicant that he was not debarred from filing proper Objection Proceedings, through which he could put forward his claim of ownership of the motor vehicle.

In the face of the judgment dismissing his appeal, the applicant filed an application seeking a review of the said judgement.

On 22nd January, 2013, the High Court dismissed the application for review. It was the considered view of the Judge that if the applicant was aggrieved by her judgement, then he ought to have filed an appeal.

On 29th January, 2013, the applicant lodged a Notice of Appeal, indicating his intention to appeal to the Court of Appeal.

Thereafter, on 31st January, 2013, the applicant filed an application for stay of execution pending appeal. That application was filed under a Certificate of Urgency, and it was heard, initially, on the same date.

The court granted interim relief, staying execution until 19th February, 2013.

On 6th February, 2013, the applicant filed the current application. It became necessary to do so because the lorry had been sold, notwithstanding the orders made on 31st January, 2013, staying execution.

That is the application before me.

The first question is whether the sale was fraudulent or illegal. That contention is founded upon the fact that the sale took place when an order was already in place, stopping it.

It is true that on 31st January, 2013, **Mshila J.** ordered that there be a stay of execution pending the interpartes hearing on 19th February, 2013.

But it is equally true that the applicant did not extract the formal order nor serve the same before 4th February, 2013, when the vehicle was sold.

It must be emphasized that when a person has not been made aware of an order made against him, he cannot be said to have violated the said order.

However, the Decree Holder and the Court Broker are obliged to comply with the law governing execution of decrees. Did they comply?

As regards the alleged failure by the court broker to advertise the sale at least 15 days before the date of sale of the movable property, the respondents contend that it is not for them to speak on behalf of the court broker.

I agree that the court broker is the right person to state whether or not they complied.

However, **Messrs Karira & Company Advocates**, who act for the respondents are well aware that on 29th January, 2013, their firm asked the Learned Chief Magistrate to re-issue warrants of sale.

That request was made some five (5) days after the Court Brokers had already advertised the sale of the lorry. One cannot help but wonder why the respondents were making that request if the advertisement was lawful.

Secondly, the period between 24th January, 2013, when the sale was advertised, and 4th February, 2013 when the lorry was sold, is less than 15 days.

Of course, I am alive to the fact that the advertisement of the sale is not the same thing as the affixation of a notification of the sale by way of a public notice.

Order 22 rule 1 of the Civil Procedure Rules stipulates as follows:-

“Where any property is ordered to be sold by public auction in execution of a decree, the court shall cause public notice and advertisement of the intended sale to be given in such manner as the court may direct.”

Thereafter, Rule 58 states that No sale of immovable property shall take place without the consent of the judgement – debtor until after at least 15 days have lapsed from the day when the public notice of the sale had been affixed at the precincts of the court of the Judge who ordered the sale.

There is no evidence of the date when the public notice of sale was affixed.

The applicant filed an affidavit showing that the court broker was served with the application on 7th February, 2013.

Although the court broker was not named as a party to the application, it is obvious that the allegations of impropriety were directed against him. Therefore, he should have filed an affidavit to respond to the assertions.

As the court broker filed no affidavit, and also because he did not deem it appropriate to respond in any other manner to the assertions made by the applicant, the same are deemed as uncontroverted.

But then again, if the property was sold, there must be a person who purchased it. The identity of that person is not known to this court.

Justice demands that before an adverse order is made against any person, he should be afforded an opportunity to be heard. I cannot therefore nullify the sale without first giving to the purchaser an opportunity to be heard. I therefore direct the court broker who practices under the trade name of IGARE AUCTIONEERS, to file in this court, an affidavit providing the name and address of the person who purchased the lorry Registration KYE 210. The said affidavit is to be filed and served on all parties within 4 days of service of this order.

The court broker is further directed to notify the purchaser that he is required to present himself before this court on May, 2013.

Meanwhile, the court broker is also granted leave to file an affidavit, providing answers to the issues raised by the applicant. The court broker has 4 days from today to file and serve the said affidavit. Thereafter, he will be accorded a hearing before the court gives further orders.

Until such time as this court gives further orders, the motor vehicle in issue will remain in the hands of the Court broker, and will neither be transferred nor be encumbered in any manner.

**DATED, SIGNED AND DELIVED AT ELDORET
THIS 29TH, DAY OF APRIL, 2013**

**FRED. A. OCHIENG
JUDGE**